STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2007
v	No. 269142 Washtenaw Circuit Court
UWE PETER HOLZER, Defendant-Appellant.	LC No. 04-000351-FH

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of arson of real property, MCL 750.73, and insurance fraud, MCL 500.4511(1), resulting from a fire that occurred at defendant's business, Countryside Catering. On July 25, 2005, the trial court delayed sentencing for six months and imposed conditions, including the payment of restitution. On February 6, 206, the trial court sentenced defendant to six months in jail after finding that defendant was not complying with the conditions imposed. The court denied defendant's motion for a new trial. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in denying his motion to compel defendant's insurer, Hartford Insurance Company, to produce certain documents on the basis that the material sought was protected by the attorney-client and attorney work-product privileges. Whether the attorney-client privilege applies to a communication is a question of law that this Court reviews de novo. *Leibel v General Motors Corp,* 250 Mich App 229, 236; 646 NW2d 179 (2002). Similarly, whether the work product privilege applies is a question of law that is reviewed de novo. *Koster v June's Trucking Inc*, 244 Mich App 162, 168; 625 NW2d 82 (2000). A trial court's decision to grant or deny a discovery request is reviewed for an abuse of discretion. *Chastain v General Motors Corp (On Remand),* 254 Mich App 576, 593; 657 NW2d 804 (2002).

Defendant sought discovery of the "investigations performed by Hartford Insurance concerning the cause and origin of the fire, the a [sic] so-called forensic accounting, and the electronic system investigation performed on Countryside Catering . . . caused by the fire dated November 10, 2003." Michael Small, the attorney for Hartford, requested an order excusing

compliance with the subpoena to the extent it sought the production of Small's privileged communications with Hartford.

"Opinions, conclusions, and recommendations based on facts are protected by the attorney-client privilege when the facts are confidentially disclosed to an attorney for the purpose of legal advice." *Leibel, supra* at 239. "The purpose of the attorney-client privilege is to permit a client to confide in the client's counselor, knowing that the communications are safe from disclosure." *Co-Jo, Inc v. Strand,* 226 Mich App 108, 112; 572 NW2d 251 (1997). When attempting to pierce the protection of a privilege, a defendant must establish a reasonable probability that privileged records are likely to contain favorable and material information that is necessary to the defense, at which point the records are turned over to the judge for an in camera review. *People v Fink,* 456 Mich 449, 455; 574 NW2d 28 (1998).

At the January 14, 2005, evidentiary hearing on the motion to compel, Small brought copies of the requested material, including material that was previously withheld, either completely or through redaction. According to Small, the withheld material consisted primarily of his letters to Bedford. Small provided the material to the court, which then examined the material and concluded that it was privileged and not essential to defendant's case. Indeed, the privileged material was not provided to the prosecution, either. Defendant has failed to demonstrate that the trial court erred in its determination.

II

Defendant also argues that the insurance company's electrical expert, Stalter, took evidence from the scene to a facility in Ohio for further analysis, without authority, in an attempt to preclude defendant from examining it. However, Stalter removed the items from the scene pursuant to a signed consent form giving him the authority to remove items from the scene. Further, the record reveals that defense counsel went to Ohio to examine the evidence and was allowed to examine every item taken from the crime scene. Thus, defendant's argument is misplaced.

III

Defendant further argues that the security alarm system representative's examination of the security alarm system amounted to an intentional loss of evidence that should be held against the prosecutor because the representative was unable to recover the time that defendant left the business. However, the record reveals that defendant did not subscribe for the service that automatically makes a record of when the alarm is keyed on and off. Thus, the potential for recovery of that information in the damaged chip was not certain. Further, defendant himself asked the representative to take the chip and attempt to recover the information on the day of the fire. The lack of information from the chip was the result of malfunctioning of the system because of the intense heat, and not the result of the representative's inability or negligence. Thus, defendant's argument is without merit.

IV

Defendant argues that two of his exhibits at trial were "lost" and were not provided to the jury until 15 minutes before the jury rendered its verdict. He asserts that he had "no means for obtaining the lost evidence" and was "deprived of his ability to reconstruct the scene."

The two exhibits at issue – a diagram of the office and its contents before the fire, and a photograph of a burned cinder block - were not admitted into evidence. However, because the exhibits were used during the trial, the prosecutor stipulated to their admission and the exhibits were presented to the jury. Defendant's contention that the jury failed to carefully consider the exhibits is pure speculation.

V

Defendant argues that he was denied his rights of confrontation, compulsory process, and fair trial by the trial court's refusal to order the prosecutor to produce a crucial endorsed witness. This Court's review is limited to whether the trial court's determination was clearly erroneous. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991).

On the eve of trial, the prosecutor received a motion in limine from defense counsel in which defense counsel sought to have the prosecutor produce a witness who resided in Ohio. On the day of trial, the trial court indicted that the pretrial order provided that all motions in limine had to be heard before trial commenced. Thus, the trial court refused to consider the motion.

Nonetheless, the record reveals that the prosecutor was not required to produce the witness. "The 1986 amendments of MCL 767.40a altered a prosecutor's duty to produce witnesses at trial. Before 1986, the statute plainly imposed on a prosecutor the duty to list all res gestae witnesses on the information and to produce them at trial." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). "With the amendments, the Legislature replaced the prosecutor's duty to produce res gestae witnesses with 'an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request.'" *Id.* at 418-419. The prosecution is now required to give initial and continuing notice of all known res gestae witnesses, identify witnesses the prosecutor intends to produce, and provide law enforcement assistance to investigate and produce witnesses the defense requests. *Id.* at 419.

Nothing in the record indicates that the prosecution ever intended to call the witness[1] or that defendant ever requested law enforcement assistance in producing him before the morning

[1] In response to defendant's motion in limine, the prosecutor stated:

> Your Honor, that is patently absurd. He's on their witness list. I put him on my witness list after he – he discovered [the witness]. I'd never even heard of the man before [defense counsel] started digging into the insurance records which I've never received from [defense counsel]. He puts [the witness] on his witness list first. So then me, thinking that how contentious as this has been, I better put [the witness] on my witness list so I can call him on rebuttal. Then he takes him

(continued…)

trial commenced. Defendant's claim of error is therefore without merit. Additionally, inasmuch as defendant argues that the witness was a favorable witness for the defense, defendant's confrontation clause with regard to the right to confront the witnesses *against* him is without merit.

VI

Defendant argues that the trial court erred by denying defendant's motion to suppress evidence on the ground that defendant freely and voluntarily singed a consent to search form. This Court reviews for clear error a trial court's findings of fact in deciding a motion to suppress evidence as unconstitutionally seized, and reviews de novo the trial court's decision whether to suppress the evidence. *People v Beuschlein,* 245 Mich App 744, 748; 630 NW2d 921 (2001).

A search without a warrant may be reasonable when based upon valid consent to the search. *People v Dagwan*, 269 Mich App 338, 342-343; 711 NW2d 386 (2005). Whether a person has freely and voluntarily consented to a search is a question of fact for the trial court to determine based on an assessment of the totality of the circumstances. *Id.* at 342-343.

To be valid, consent must be shown by the prosecution to have been made without duress or coercion, and must be unequivocal, specific, and freely and intelligently given. *People v Farrow*, 461 Mich 202, 206; 600 NW2d 634 (1999). Defendant argued below that his physical and mental condition prevented him from giving valid consent to search the premises. Specifically, he relies on the fact that he began hyperventilating, became short of breath, and was transported to the hospital after being advised that his business was on fire, as well as the fact that he has had heart problems in the past, in support of his argument that he did not understand what he was signing or the purpose of the form.

At the suppression hearing, Captain Dettling testified that defendant perused the consent form and that the form was explained to defendant. Dettling stated that defendant was very willing to sign the consent form and showed no signs of hesitancy or doubt. Dettling indicated that he had known defendant for many years and that, though defendant was upset about the fire, he was relatively calm. Although defendant presented the testimony of his son and former employee that defendant was in poor condition and in a state of shock after suffering an anxiety attack, neither of those persons were present when defendant signed the form. Although O'Brien witnessed defendant's signature, his testimony revealed that he was not paying attention to the conversation occurring between the officers and defendant. The trial court denied the motion to suppress, finding that the form was clear and concise and that there was no evidence that defendant's health precluded him from understanding the form.

(…continued)

> off his witness list and says I have to – I have to provide [the witness]. I've never talked to him. I've never spoken to [the witness].
>
> We've not subpoenaed [the witness] because he lives in Ohio. The only reason I put him on my witness list was as a reaction to him putting him on his witness list . . .

In this case, the trial court clearly found Dettling to be a credible witness and factually concluded that defendant consented to the search of his building. Defendant fails to show that the trial court's finding in this regard was clearly erroneous, and therefore, there is no error in the trial court's decision to deny defendant's motion to suppress evidence seized from the search of his building.

VII

Defendant argues that the trial court erred by denying his motion to suppress his statement to the police. This Court reviews a trial court's factual findings at a suppression hearing for clear error, but the ultimate ruling on a motion to suppress is subject to review de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996).

Defendant contends that he was in custody and not advised of his *Miranda* rights before he made a statement to police when he was taken to a substation for questioning, that his statements were involuntary, and that the trial court therefore erred by refusing to suppress his statement.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Here, there is no dispute that defendant did not receive *Miranda* warnings before he made his statement. However, it is well settled that *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384, 395; 415 NW2d 193 (1987); *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000). A custodial interrogation is questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether an accused was in custody depends on the totality of the circumstances. *Id.* The key question is whether the accused could reasonably believe that he was not free to leave. *Id.* "The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." *Id.*

A. *Miranda* Warnings

The requirement of warnings is not to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." *People v Mendez*, 225 Mich App 381, 384; 571 NW2d 528 (1997). General on-the-scene questions to investigate the facts of a crime do not necessarily implicate *Miranda*. *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002).

At an evidentiary hearing, undisputed testimony was presented that defendant voluntarily went to the scene of the fire. Numerous witnesses testified that defendant wandered around the scene talking to a number of individuals, including police and fire investigators, employees, and

family members. Detective Blackwell testified that he was not in uniform and did not carry a weapon. According to Detective Blackwell, when he arrived at the scene defendant was not a suspect despite the fact that arson was suspected. Detective Blackwell wanted to talk to defendant to gather information. Defendant cooperatively agreed to talk with Blackwell. Defendant rode to the Dexter Village substation with Detective Blackwell in the front seat of Detective Blackwell's unmarked Ford Taurus. Defendant was not in handcuffs and was not under arrest. Defendant's son accompanied him to the substation and waited in the lobby while the men talked. During the conversation, defendant did not admit responsibility for the fire and said "nothing close to a confession." The officers asked defendant if he would leave his clothing to be tested, and defendant cooperatively agreed. Defendant's son brought him a change of clothing. Defendant left the substation that night and was neither in custody nor under arrest. In contrast, defendant presented evidence that he was "shaky" and disoriented, and he testified that he did not think that he had a choice about going to the substation. Under these circumstances, the trial court did not clearly err in finding that defendant was not in custody when he gave his statement.

B. Voluntariness

Whether a statement was voluntary is determined by examining police conduct, although whether it was made knowingly and intelligently depends in part on the defendant's capacity. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). The prosecutor must establish that a statement was voluntary by a preponderance of the evidence. *People v Abraham*, 234 Mich App 640, 645; 599 NW2d 736 (1999).

In determining voluntariness, the court should consider all the circumstances, including: the duration of the defendant's detention and questioning; the age, education, intelligence, and experience of the defendant; whether there was unnecessary delay of arraignment; the defendant's mental and physicalstate; whether the defendant was threatenedor abused; and any promises of leniency. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

Viewing the totality of the circumstances, the trial court did not clearly err in finding that defendant's statement was voluntary. Defendant claims that his statement was involuntary because of his medical history, because he had just been released from the hospital that morning after suffering an anxiety attack, and because he was in a daze and incoherent. Although it is true that defendant suffered an anxiety attack the morning of the fire, the undisputed evidence reveals that defendant was released from the hospital a short time after being transported to the hospital, that he requested to go to the scene, and that he strolled around the premises conversing with a number of individuals. Although defendant presented evidence that he was pale and confused, the prosecutor presented evidence that defendant was behaving in a normal fashion and was not disoriented or confused. The trial court found that that defendant's medical condition did not render him incompetent to understand what was happening and that he voluntarily made the statement. This Court defers to the trial court's superior ability to view the evidence and the witnesses. *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

With regard to the other factors, there is no evidence that defendant was intoxicated, deprived of sleep, food, or drink, or under the influence of drugs. There is no indication that defendant had learning disabilities or had been diagnosed with any psychological problems.

Although defendant was visibly upset, there is no indication that he was extremely distraught to the extent that he was not acting freely. Viewing the totality of the circumstances, this writer is not left with a definite and firm conviction that a mistake has been made.

Additionally, it is worth noting that admissions of fact which do not themselves show guilt require no determination of voluntariness. *People v Wytcherly*, 172 Mich App 213, 219; 431 NW2d 463 (1988), on reh 176 Mich App 714; 440 NW2d 107 (1989), but see *People v Jobson*, 205 Mich App 708; 518 NW2d 526 (1994). And, even assuming that the trial court erred in determining that defendant's statement was voluntary, any error was harmless as the statement made by defendant at the substation was not inculpatory.

VIII

Defendant asserts that a diagram of the business that marked the order in which the security devices activated was improperly admitted into evidence. This Court reviews for an abuse of discretion a trial court's decision whether to admit evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Defendant's objection to the diagram stems from the presence of a "stick figure" shown to be moving through the property, following the activation of the burglar alarms. He argues that the presence of the stick figure suggested to the jury that a person was definitely the cause of the fire, and that such a suggestion is speculative and not based on scientific evidence. He maintains that the expert testimony of Mr. Conner, the owner of the alarm company, interpreting the diagram was improperly admitted under MRE 702 and 703.

However, Conner was not offered as an expert witness. He was not asked if he had an opinion regarding the cause and origin of the fire, nor was he asked to formulate a theory of what happened the day of the fire. Rather, Conner articulated the order in which the alarms activated through the diagram and, based on his knowledge of the alarm system and the building, agreed with the prosecution that the manner in which the alarms were tripped was consistent with a person entering through the rear door, setting a fire, and leaving the same way he came in. When analyzed under MRE 701, the rule governing opinion testimony by lay witnesses, it is clear that Conner's testimony was rationally based on his perceptions and was helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Opinions of lay witnesses can include conclusions. *People v Johnson*, 427 Mich 98, 152; 398 NW2d 219 (1986). The diagram was properly admitted because it was based on Conner's perception, and helped to clarify the testimony surrounding the intricacies of the alarm system. See, e.g., *People v Oliver*, 170 Mich App 38, 49; 427 NW2d 898 (1998) (two police officers were permitted to testify that dents in a car could have been made by bullets, even though neither officer had training in ballistics or was qualified as an expert). Further, defense counsel had ample opportunity to cross-examine Conner as to what else could have triggered the alarms and, in fact, did so. Conner admitted during cross-examination that he could not be certain it was a person that triggered the alarms and admitted that it could have been more than one person, and that if it was indeed a person he would have had to have been moving quite fast.

IV

Defendant argues that defense counsel was ineffective for failing to effectively impeach the prosecution witnesses. This Court reviews an unpreserved claim of ineffective assistance of counsel for mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant argues that defense counsel failed to effectively impeach Sgt. Hooker's testimony regarding the origin of the fire. He maintains that Hooker's testimony at the preliminary examination was inconsistent with Hooker's trial testimony and actually supported defendant's theory that the origin of the fire was a conduit in a cinder block near the northeast corner of the office.

At the preliminary examination, Sgt. Hooker testified on direct examination that the origin of the fire was the northeast corner of the office. On cross-examination, when asked about the dimensions of the area, Sgt. Hooker replied,

> Approximately four by four, to five by five. A square, rectangle. The corner of the room, maybe five feet out, five feet this way, in that area. **Where the lighter fluid had been dumped.** [In his brief on appeal, defendant omits from his quotation the above statement in bold.]

Sgt. Hooker continued:

> What I did see is that the vinyl flooring had been consumed completely in that corner. They were on a concrete slab. I found the remains of vinyl flooring moving away from that area of origin. There was still the remains of vinyl flooring, which is consistent with a – a low burn pattern being on the floor and the flooring being consumed.

And, he testified that the burn patterns:

> Support that the origin of the fire is the northeast corner of the room.

At trial, Sgt. Hooker testified that the fire started in the northeast corner of the office where he found some cardboard soaked in charcoal lighter fluid. Defendant argues on appeal that the dimensions identified by Sgt. Hooker at the preliminary examination include the area where the cinder block (on which defendant's theory at trial was based) was located and that defense counsel should have impeached Sgt. Hooker with his prior testimony.

Decisions regarding how to cross-examine and impeach witnesses are matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Sgt. Hooker's preliminary examination testimony was not inconsistent with his trial testimony. He indicated at the preliminary examination that the origin of the fire was the northeast corner of the office, and that the dimensions of the area included a "square" of either four feet by four feet or five feet by five feet "where the lighter fluid had been dumped." He indicated at trial that the origin of the fire was the northeast corner of the office. Defendant's argument is simply misplaced.

V

Lastly, defendant maintains that he was denied his right of confrontation "by the introduction of hearsay testimony and expert testimony based on evidence that was not introduced at trial." He argues that private investigator Wiley's opinion regarding the cause of the fire was based on the report of a witness who did not testify. But Wiley investigated the scene of the fire, and the prosecutor merely asked Wiley what he saw. It was defense counsel who asked Wiley about the witness's report and about relying on that report in making his determination. Defense counsel also elicited from Wiley the conclusion of the witness's report. Defendant cannot now argue that he was prejudiced as a result of his own actions.

Defendant also argues that the report identified as the "mail out report" was improperly admitted. But defendant stipulated to the admission of this exhibit. Defendant cannot now complain of error. Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

Finally, defendant challenges the testimony and report of Epps, the forensic accountant, which was based on an analysis of defendant's financial records, on the ground that the testimony and report was based on materials not introduced into evidence. Epps' report was based upon the financial records he obtained from defendant when he visited defendant's home to examine the business' financial affairs. Defendant gave Epps access to his home computer, and Epps downloaded the data on which he based his report from that computer. He retrieved financial statements, tax returns, payroll data, mortgage data, lease information, and Quick Books bookkeeping data. These documents and computer disks were all admitted into evidence. Defendant stipulated to admission of the physical documents, and the court asked both parties to agree on which data from the disks should be admitted and to redact the remaining portion. The portions that were admitted were directly related to Epp's testimony. Thus, defendant's argument is without merit.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Peter D. O'Connell